

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, A. D. 1918.

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No. ....

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THE DES MOINES UNION RAILWAY COMPANY,  
FREDERICK M. HUBBELL, FREDERICK C.  
HUBBELL and F. M. HUBBELL & SON,  
*Petitioners,*

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY and THE WABASH  
RAILROAD COMPANY,  
*Respondents.*

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**REPLY TO CROSS-PETITION FOR WRIT OF  
CERTIORARI.**

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Supplementing the reply of respondent, the Chicago, Milwaukee and St. Paul Railway Company, to the cross-petition for writ of *certiorari*, attention is called to the following additional matters:

## L

The contract of May 10, 1889, on which petitioners rely (Record, p. 150), after describing the terminal property, including the proposed union passenger depot and additional facilities to be constructed, obligated the predecessors of respondents to pay the maintenance and operating cost, interest and taxes, etc., and then by section 6 (Record, p. 152) "the party of the first part in consideration of the payments to be made to it by said parties of the second part hereby **grants** to said second parties the use of its terminal properties as aforesaid"—a grant not merely of a right to use, but of the "use of", i. e., entire usefulness or **usufruct** of "its terminal properties", and, of course, includes the income derived from switching, station privileges, etc.

That the language of the grant expressed the intentions of the parties is obvious from the fact that all parties understood at the time that the grantees owned the terminal properties as shown by the evidence of Colonel Blodgett in regard to the purposes of the contract (Record, p. 366) by the resolution of the Des Moines Union Railway Company (hereinafter called the Des Moines Company), requesting him to prepare it "to be approved and executed by all lines now holding an **interest in the property**", and by its resolution that "the terms and conditions on which

the several lines now interested or which may hereafter become interested shall enjoy the use of these terminals be fully set forth in a **supplemental** agreement to be made and executed between the Des Moines Union Railway Company and each of the lines using the said terminals" (Record, p. 478). The contract could have been **supplemental** only to the contract of January 2nd, 1882 (Record, p. 120) and according to the resolution its purpose was to define the terms and conditions on which the **grantees** should enjoy the use of the terminals, not to define or recognize any right in the Des Moines Company, and accordingly no rent or compensation for the use of the terminals was reserved and all the covenants were by or for the benefit of the grantees—the Des Moines Company not having the slightest interest in their performance—it being merely an umpire or agency employed to unify the operations and bookkeeping and enforce the covenants as between the grantees for whose sole benefit they were made.

## II.

(a) The parties at the outset committed themselves to a construction of the contract which entitled the grantees to the income produced by switching, station privileges, etc., by crediting it on their bills, first, under the direction of the joint superintendent (Record, p. 271), and after February 11, 1911, pursuant to

resolution of the Des Moines Company (Record, p. 497), and they were so credited until December, 1891 (Record, p. 333), when the Des Moines Company passed a further resolution that "the sum received as rent of real estate and all switching charges" should be used "to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies" (Record, p. 499), which was equivalent to crediting the sum on the grantees' bills because cash purchases of supplies and payment of current bills would to that extent lessen the grantees' bills. This method of applying such income was to be temporary "to accumulate a small fund for working capital", and it was intended the practice of directly crediting the bills should be resumed January, 1893 (see Supt.'s letter, Record, p. 338).

(b) After the Des Moines Company had thus committed itself to a construction of the contract which entitled the grantees to the income from the switching, etc., the grantees paid for the coal, labor and material necessary for the operation and maintenance of the engines, tracks, passenger station and real estate which produced the income in controversy. The petition states, on page 12, "at the time of the trial in the District Court these earnings aggregated about half a million dollars, and they have accumulated since at the rate of about one hundred thousand

dollars a year.” The outlays by the grantees for fuel, labor, material, etc., in producing those earnings must have been very considerable, which, together with the protest made by the grantees when first advised, shortly before the bringing of this suit, by F. M. Hubbell, that he claimed the grantees were not entitled to such earnings (Record, p. 329), justifies the inference that the grantees made such outlays on the faith of the uniform construction of the contract by all the parties. Having stood by and knowingly permitted the grantees and their assigns to pay the cost of producing the income in controversy on the assurance of said resolutions that they were entitled to it, the Hubbells are now estopped from causing the Des Moines Company to claim, and it is estopped from claiming, the contrary.

### III.

The income from switching, etc., belongs to the respondents because it was derived from the **use and occupation** of the terminal property which the predecessors of <sup>respondents</sup> ~~plaintiffs~~ secured to themselves and their successors by the contract of January 2nd, 1882 (Record, p. 120); articles of association of the depot company (Record, p. 123) and the resolutions pursuant to which the terminal property was transferred to (Record, pp. 131-7) and received by the Des Moines Company (Record, pp. 130-1).

The right to the "use and occupation" of railroad property by a railroad company under the laws of Iowa embraces the entire usefulness of the property (*Cummins v. Des Moines, St. Louis Railroad Company*, 63 Iowa 397, *l. c.* 405; *Smith v. Hall*, 103 Iowa 95, *l. c.* 96-97).

The contract of May 10th, 1889, was merely an operating agreement defining the operations of the interested railway companies for a period. The Des Moines Company under its articles of incorporation (*Record*, p. 123) is the agency of these companies who nominated its directors, it having undertaken by article II to exercise all of its powers "in accordance with the terms and spirit of the aforesaid contract entered into on the second day of January, 1882".

#### IV.

The petition states on page 24 that "the Hubbells, father and son, gave liberally and freely, the son for many years entirely, their time and service to this enterprise. They fostered it during all the thirty years of the contract of 1889, which certainly they would not have done if this contract had been a barren one and their stockholdings barren also", but no reference is made to the record to justify this statement. The record shows that the Hubbells agreed when they purchased the stock from Ashley that "the stock should be held by a railway com-

pany entitled to use the terminal property" and that "it would be prejudicial to sell any of this stock to outsiders" (Record, pp. 1059-1060), and contrary to this understanding they acquired the stock from the companies they dominated at a nominal value (Record, pp. 1096-1097). The stock, therefore, was "barren" and they knew it was barren, and are not entitled to derive contrary to their agreement any profit from it. Hubbell testified, "I stated very clearly that I am in charge of that property (meaning the terminal property); I know all about it, manage it, buy all the material. I decide on the location of every track, side tracks and main line, changing of the tracks, everything in reference to the details of the business" (Record, pp. 1200-1201).

The son testified:

"Q. Did you or your father, or together as a firm, own and deal in real estate located near the lines of the Des Moines Union?

"A. Yes, sir; F. M. Hubbell has bought considerable lands along the Des Moines Union, and I have, also. I am a trustee in his estate.

"Q. Well, didn't you and your father make a large sum of money in those real estate transactions?

"A. The real estate which we have bought and held I think has gone up in value very considerably.

"Q. You have made plenty of money out of that that you have sold, haven't you?

"A. I do not recall ever having sold any at

a loss, because property has always advanced in Des Moines; I mean, as a general rule (Record, pp. 1198-1199)."

The Hubbells own the Des Moines Terminal Company and the Des Moines Western Terminal Company, which also own terminal railroad properties in Des Moines, and the Hubbells operate them for their own profit in connection with the operation of the Des Moines Company (Record, pp. 1200-1201).

It is respectfully submitted the question sought to be reviewed by petitioners is not an open one and that the petition should be denied.

Respectfully submitted,

JAMES L. MINNIS,

*Counsel for Respondent Wabash  
Railway Company.*



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	J. F. How	1 share	
	C. M. Hays	1 share	
	Purchasing Committee	998 shares	
	D. M. & N. Ry.	998 shares	
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